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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No.

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1625, AFL-CIO, and WILLIAM TRAVIS, President of Retail Clerks International Association, Local 1625, AFL-CIO, *Petitioners,*

v.

ALBERTA SCHERMERHORN, LOIS DEVITA, JOYCE E. THURO, and LARRY STARK, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioners pray that a writ of certiorari issue to review the decision of the Supreme Court of Florida entered in the above-entitled case on April 25, 1962.

OPINIONS BELOW

The decision and order of the Florida Circuit Court of Dade County (printed in the Appendix hereto, *infra*, pp. 20a-21a) is not reported officially but is unofficially reported in 47 LRRM 2300 (1960). The order of the

Florida Court of Appeal, Third District (printed in the Appendix hereto, *infra*, pp. 18a-19a), relinquishing its jurisdiction over the cause and transferring it directly to the Florida Supreme Court, is officially reported in 141 So. 2d 287 (1961) and, unofficially, in 48 LRRM 3119 (1961). The opinion of the Florida Supreme Court (printed in the Appendix hereto, *infra*, pp. 1a-14a) is officially reported in 141 So. 2d 269 (1962) and, unofficially, in 50 LRRM 2055 (1962). The mandate of the Florida Supreme Court has been stayed for a period of 120 days to permit the filing of this petition (Orders printed in the Appendix hereto, *infra*, pp. 14a-19a).

JURISDICTION

The judgment of the Supreme Court of Florida was entered on April 25, 1962, and has been stayed to enable petitioners to seek review in this Court. On July 19, 1962, an order extending the time for filing a petition for certiorari until August 24, 1962, was entered by Mr. Justice Black. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

Section 14(b) of the Taft-Hartley Act authorizes the states to prohibit labor contracts requiring "membership" in a labor union as a condition of employment. The question in this case is:

> Whether the Florida Supreme Court misconstrued § 14(b) of the Taft-Hartley Act in holding that it authorizes the states both to prohibit and to regulate an "agency shop" clause in an interstate labor contract, which clause does *not* require "membership" in a labor union but which does require non-member employees to pay a collective bargaining service fee to a labor union.

STATUTES INVOLVED

Section 14(b) of the National Labor Relations Act (61 Stat. 151, 29 U.S.C. § 164) provides as follows:

> Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

Section 12 of the Declaration of Rights of the Florida Constitution (§ 12, 25 Fla. Stat. Ann.) provides as follows:

> The right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer.

STATEMENT

Petitioner Retail Clerks Local 1625 (hereinafter called "the union") is the recognized, exclusive bargaining agent for several thousand retail grocery clerks employed by Food Fair Stores, Inc., in five Southern Florida counties (R. 1, 14 p. 1). Food Fair is a large, interstate retail food chain (R. 28, 68).[1]

In negotiations for their current labor agreement, which is effective until April 15, 1963, the employer

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[1] The National Labor Relations Board has regularly asserted jurisdiction over this employer. Florida Wholesale Grocery Co. d/b/a Food Fair Stores, 83 NLRB 852 (1949); Food Fair Stores, Inc., 120 NLRB 497 (1958); Food Fair Stores, Inc., 138 NLRB No. 2, 50 LRRM 1512 (1962); NLRB v. Food Fair Stores, Inc., ... F. 2d ...., 50 LRRM 2913 (3d Cir. 1962).

and the union agreed upon a provision commonly known as an "agency shop" clause. This clause, whose validity has been challenged by the litigation at bar, provides as follows (R. 3, 8, 14):

> "'Employees shall have the right to voluntarily join or refrain from joining the Union. Employees who choose not to join the Union, however, and who are covered by the terms of this contract, shall be required to pay as a condition of employment, an initial service fee and monthly service fees to the Union for the purpose of aiding the Union in defraying costs in connection with its legal obligations and responsibilities as the exclusive bargaining agent of the employees in the appropriate bargaining unit. The aforesaid fees shall be payable on or before the first day of each month, and such sums shall in no case exceed the initiation fees and the membership dues paid by those who voluntarily choose to join the Union. Other than the payment of these service fees, those employees who do not choose to join the Union shall be under no further financial obligations or requirements of any kind to the Union.' It shall also be a condition of employment that all employees covered by this Agreement shall on the 30th day following the beginning of such employment or the effective date of this agreement, whichever is later, pay established initial and monthly service fees as shown above."

In November of 1960, four bargaining unit employees instituted an action for damages and an injunction against the employer, the union, and the union's president in the Florida Circuit Court for Dade County (R. 1). The gravamen of their complaint was that the "agency shop" clause violated Article 12 of the Declaration of Rights of the Florida Constitu-

tion, popularly known as a "right-to-work" law (Decl. of Rts., Fla. Constn., § 12, 25 Fla. Stat. Ann.) (R. 3-4).

Moving to dismiss the complaint and opposing plaintiffs' application for a temporary injunction, defendants pleaded that the "agency shop" clause does not violate Florida law, because it does not require "membership" in the union, and that the state courts have no jurisdiction to regulate this method of financing a union's collective bargaining functions in interstate commerce, because the subject matter is preempted by federal law and is subject to the exclusive administration of the National Labor Relations Board (R. 9, 11).

On plaintiffs' motion for a temporary injunction and defendants' cross-motion to dismiss, a full trial was held before the trial court who heard the testimony of various witnesses and who received documents and depositions into evidence (R. 15-16). Based on the pleadings and the evidence, the trial court held that this "agency shop" clause did not violate the Florida Constitution. Judgment for defendants was granted dismissing the complaint (R. 15-16).

Plaintiffs appealed to Florida's Third District Court of Appeal contending that the trial court's decision was erroneous as a matter of Florida law. To preserve the federal questions, defendants cross-appealed reiterating their defense in this court that the federal labor statutes have occupied the field and that the state courts have no power to proscribe this method of financing collective bargaining functions in interstate commerce (R. 18). After hearing argument and rendering a decision reversing the trial court, but before its decision became final, the District Court of Appeal vacated its decision and transferred the entire proceed-

ing to the Florida Supreme Court because an intervening decision of the Florida Supreme Court had held that District Courts of Appeal have no jurisdiction to review cases involving a "controlling" construction of the state constitution (R. 20). The entire proceeding was then transferred to the Florida Supreme Court for decision on a "direct appeal" (R. 20, 24).

With two justices dissenting on jurisdictional grounds,[2] the Florida Supreme Court held that this "agency shop" clause violated the state's "right-to-work" policy. It reversed the trial court (R. 24), adopted *in haec verba* the vacated decision of the District Court of Appeals (R. 24), and it expressly rejected defendants' contention that federal law deprives the state courts of jurisdiction to enjoin the enforcement of this contract (R. 26, 28-29).

The substance of the Florida Supreme Court's disposition of the issue of federal preemption of state court jurisdiction over the subject matter is contained in the following paragraph from its opinion (R. 26):

> "The appellees further assert that our state courts are without jurisdiction to determine this matter, because of the pre-emption by the federal government of the field of labor relations, by virtue of the Labor Management Relations Act, 29 U.S.C.A. §§ 141-188. We hold, as did the Supreme Court of Kansas in the case of Higgins v. Cardinal

[2] The dissenting justices did not state their reasons for dissenting (R. 34). They may have dissented either because they disagreed with the majority's acceptance of this case as a "direct appeal" from the trial court or because they agreed with petitioners herein that the state courts have no jurisdiction to regulate the subject matter.

Manufacturing Company, 188 Kan. 11, 360 P. 2d 456, that Section 14(b) of the Taft-Hartley Act [29 USCA §.164(b)] preserves the jurisdiction of the states in matters involving state "right-to-work" provisions. It is true that Section 14(b) specifically deals only with 'agreements requiring *membership* in a labor organization as a consideration of employment . . .' However, it is not to be presumed that Congress would preserve to the states the field of right-to-work legislation, while, at the same time, intending that unions and management could, by the use of subterfuge of an agency shop clause, circumvent and, in effect, nullify a paramount provision of the organic law of any of the several states."

This petition followed.[3]

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[3] As a consequence of a procedural-clerical error in the Circuit Court, arising from the transfer of the case to the Florida Supreme Court as a direct appeal, the testimony of witnesses, depositions and several exhibits introduced in the trial court (R. 15-16) never reached the Florida Supreme Court. However, petitioners' brief to the Florida Supreme Court, a part of the record here, sets forth the uncontradicted facts adduced before the trial court (R. 68-70). This evidence was intended merely to show the panoply of benefits which all employees in this bargaining unit have received as a result of the union's services on their behalf. While this evidence demonstrated the equity and fairness of the "agency shop" under the circumstances, it was unnecessary to the Florida Supreme Court's passing on the issue of state court jurisdiction, and it is equally unnecessary to this Court's jurisdiction to review the federal questions herein.

In the absence of the full factual record, the parties' contract, which was before the Florida Supreme Court, adequately sets forth the entire range of benefits negotiated by the union, including wages, vacations, holidays, leaves of absence, insurance protection, grievance machinery, seniority rights and many other valuable, collectively bargained rights and benefits (R. 14).

REASONS FOR GRANTING THE WRIT

I. THE CONSTITUTIONAL AND JURISDICTIONAL ISSUES HEREIN ARE OF GREAT AND IMMEDIATE IMPORTANCE TO WORKERS IN NINETEEN "RIGHT-TO-WORK" STATES

Whether § 14(b) of the Taft-Hartley Act authorizes the states to prohibit "agency shop" agreements in interstate commerce is a labor relations issue of burning intensity in nineteen "right-to-work" states.[4]. A definitive resolution of this issue will affect the working conditions of millions of workers. The importance of the question is second to none in the practical world of labor relations as more and more major industries, such as the basic steel and missile industries, adopt such agreements.[5]

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[4] The nineteen "right-to-work" laws are as follows: Ala. Code Ann. Tit. 26 § 375 (1958); Ark. Stat. Ann. §§ 81-201 to 205 (1960); Ariz. Rev. Stat. Ann. §§ 23-1301 to 1307 (1956); Fla. Stat. Ann. Const., Decl. of Rts. § 12 (Supp. 1960); Ga. Code Ann. §§ 54-901 to 905 (1961); Ind. Stat. Ann. §§ 40-2701 to 2706 (Supp. 1961); Iowa Code Ann. §§ 736 A.1 to .8 (1950); Kan. Const. Art. 15, § 12 (1958); Miss. Code Ann. § 6984.5 (Supp. 1958); Neb. Const. Ar. XV, §§ 13-15, Neb. Stat. Ann. §§ 48-217 to 219 (1952); Nev. Rev. Stat. §§ 613.230 to 300 (1957); N.C. Gen. Stat. Ann. §§ 95-78 to 84 (1958); N.D. Cent. Code §§ 34-01-13 (1960); S.C. Code Ann. §§ 40-46 to 46.11 (Supp. 1960); S.D. Code §§ 17.1101, 17.9914 (Supp. 1962); Tenn. Code Ann. §§ 50-208 to 212 (1955); Tex. Rev. Cir. Stat. Art. 5154g (Supp. 1960); Utah Code Ann. §§ 34-16-1 to 16-18 (Supp. 1961); Va. Code Ann. §§ 40-68 to 74.5 (Supp. 1960).

[5] As recently as July 17, 1962, a major strike in the missile industry was averted when Douglas Aircraft agreed to an "agency shop" provision in its contracts with the Automobile Workers and the International Association of Machinists. The application of these agreements to the state of North Carolina, however, has been deferred by the parties because of the legal uncertainties of the "agency shop" in that "right-to-work" state. Wall Street Journal, July 17, 1962, p. 2, col. 3.

The nation-wide strike in the basic steel industry in 1959 similarly was settled with agreement upon an "agency shop" clause in "right-to-work" states, subject to a prior legal determination of its validity. Memorandum of Agreement in Basic Steel Industry, 45 LRRM 12, 15 (1960).

A recent survey of some 400 representative collective bargaining agreements found that six percent of them contain "agency shop" provisions, a marked increase over prior surveys. Basic Patterns in Union Contracts, 46 LRRM 14, 18 (1960).

The urgency and importance of the problem is demonstrated by the growing body of reported cases in the state courts involving the scope and application of Section 14(b). See, e.g. *Arizona Flame Restaurant* v. *Baldwin*, 34 LRRM 2707 (Ariz. Sup. Ct. 1954) affirmed as modified, *Baldwin* v. *Arizona Flame Restaurant*, 82 Ariz. 385, 313 P. 2d 759 (1954); *Schermerhorn* v. *Local 1625, Retail Clerks International Association*, 141 So. 2d 269 (1962); *Meade Electric Co.* v. *Hagberg*, 129 Ind. App. 631, 159 N.E. 2d 408 (1959); *Higgins* v. *Cardinal Mfg. Co.*, 188 Kan. 11, 360 P. 2d 456 (1961), *certiorari* denied *sub nom General Drivers* v. *Higgins*, 368 U.S. 829 (1961); *Motor Coach Employees* v. *Stage Line, Inc.*, F. Supp. , 49 LRRM 2732 (D. Nev. 1961).

In the *Meade* case, *supra*, the court, proceeding on the assumption that agency shop was permissible under the federal labor law, held that the Indiana statute did not proscribe the agency shop but forbade only those contracts requiring membership in a union. Therefore, the court held that the Indiana statute did not raise a question of federal preemption. The court noted, however, that had the Indiana statute attempted to outlaw the agency shop, a serious federal question would have been raised. In *Higgins* and *Schermerhorn*, *supra*, the state courts held that the agency shop was subject to regulation by the states under § 14(b). This court denied *certiorari* in *Higgins*. However,

since the state court decision in *Higgins*, the Court of Appeals for the Sixth Circuit decided *General Motors Corp.* v. *N.L.R.B.*, F. 2d , 50 LRRM 2396 (1962), holding that an agency shop agreement is unlawful as a matter of federal law. The decision of the Sixth Circuit raises a decisive preemption issue which was not before the court when it denied *certiorari* in *Higgins*. This case is discussed in greater detail in Point IV, *infra*. Furthermore, in the absence of a definitive statement by this Court with respect to § 14(b), the states are beginning to view state "right-to-work" laws enacted under § 14(b) as a broad license under which the states may impose anti-union restrictions on the legitimate activities of labor unions, even going to the extent of outlawing union operated non-discriminatory hiring halls. See, *Kaiser* v. *Price-Fewell, Inc.*, ... Ark. ...., 50 LRRM 2531 (1962). Also see *Branham* v. *Miller Elec. Co.*, 118 S.E. 2d 167, 47 LRRM 2506 (S.C. Sup. Ct. 1961). For these reasons, and in view of the serious problem of mootness in the *Higgins* case and the greatly increased importance of the question since the denial of *certiorari* in *Higgins*, petitioner submits that the Court's refusal to grant *certiorari* in *Higgins* should not preclude consideration of the instant petition on its merits. *Darr* v. *Burford*, 339 U.S. 200, 226-228 (1949).

The importance of the issue is further underlined by a large body of recent literature on the subject,[6] as

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[6] Several authors, in agreement with petitioners herein, have concluded that the states have no constitutional authority or jurisdiction to proscribe "agency shop" contracts in interstate commerce pursuant to § 14(b). Jones, The Agency Shop, 10 Lab.

well as a complete manual on the "agency shop" for use by Commissioners of the Federal Mediation Service.[7]

While the number of employees presently covered by "agency shop" contracts is higher than ever before, the "agency shop" has been a well-known contract arrangement in the United States for many years, well before the enactment of § 14(b) in 1947.[8] The War Labor Board directed parties to incorporate such features in their agreements in the early 1940's as a compromise method of financing collective bargaining functions beneficial to all employees without imposing the legal and moral commitments of the union membership on a dissenting minority. E.g., *Alexander Primas Co.*, 21 War Lab. Rep. 219, 221 (1945).

Believing that compulsory union "membership" is an infringement on the personal liberty of workers

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L. J. 781 (1959); The Agency Shop, 14 U. Fla. L. Rev. 281, 284; The Agency Shop and State Right-to-Work Laws, 35 Notre Dame Law. 547 (1960).

Other articles which discuss the issue at bar and its importance are: McConkey, Was the Agency Shop Prematurely Scrapped?, 9 Lab. L. J. 150 (1958); Rose, The Agency Shop v. the Right-to-Work Law, 9 Lab. L. J. 579 (1958); The Agency Shop, Federal Law, and the Right-to-Work States, 71 Yale L. J. 330 (1961); The NLRB and Agency Shops in Right-to-Work States, 14 Stan. L. Rev. 182 (1962); Right-to-Work Amendment Construed—Agency Shop Prohibited, 1 Washburn L. J. 209 (1961).

[7] Federal Mediation Service, The Agency Shop (1959).

[8] Millis and Montgomery, Organized Labor 484 (1945). The authors of this famous treatise point to the execution of an "agency shop" agreement with a major tobacco manufacturer in 1942. Describing the purpose of such a contract, they observe, at p. 484:

> "This type of arrangement spreads union costs equally over those who benefit from the collective-bargaining agreement but leaves individuals free to participate in the union, or not, or to form other unions."

but recognizing that workers who enjoy the fruits of collective bargaining should in justice be required to bear their share of the costs, many Western nations have adopted the "agency shop" or variations of it in their labor relations laws and practices.[9]

This Court has not heretofore provided any guidance as to the meaning of § 14(b) on this issue. Thus,

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[9] In 1949, the Swiss Federal Court upheld the legality of an "agency shop" arrangement known in Swiss law as "loyalty to the contract" combined with a "solidarity levy." *Muller and the Swiss Federation of Autonomous Trade Unions* v. *Zurich Garage Owners' Associations and Swiss Federation of Metal and Watch Workers (Zurich Branch)*, A.T.F. 72 II 305 (1949), quoted in Berenstetin, Union Security and the Scope of Collective Bargaining Agreements in Switzerland, February, 1962, International Labour Review 101, 113: The Swiss Federal Court ruled:

> "... it would not be fair to allow an outsider, without making any financial sacrifice, to benefit by the many advantages afforded by a collective agreement, in negotiating and implementing which the contracting organizations have incurred considerable expenditure that has been met out of their members' contributions."

In Denmark, where labor organizations administer the national unemployment insurance program, non-union workers pay a one-third, added premium to the labor organization in their industry to defray its costs in administering the program. Jensen, Trade Union Dues in Denmark, No. 143 Free Labor World 171 (1962).

Canada, which often is given credit for having originated the "agency shop," has adopted it rather widely. Shister, Aaron and Summers, Eds., Public Policy and Collective Bargaining 101-102 (1962). Dudra, Union Security in Canada, 12 Lab. L. J. 585, 592-593 (1961).

A recent article suggests the emergence of an "agency shop" system of labor union financing in the Caribbean area as a method which "allows a worker to remain a non-unionist, while he pays the weekly union subscription like everyone else." Dyce, The Check-Off System in the Caribbean, No. 142 Free Labor World 130, 131 (1962).

the Florida Supreme Court has relied extensively on the decisions of other state courts as the basis for interpreting the federal statute, and doubtless still other state courts will rely upon the decision of the Florida court. If the Florida court has grossly misinterpreted the federal law, as we believe it has, a definitive interpretation of § 14(b) by this Court may help to avoid the unnecessary institution of litigation on this issue in the other "right-to-work" states.

II. THE DECISION BELOW IS IN IRRECONCILABLE CONFLICT WITH THE FEDERAL STATUTE. FOR CONGRESS USED THE TERM "MEMBERSHIP" IN ITS ORDINARY MEANING

When Congress enacted the Taft-Hartley Amendments to the Labor Act in 1947, it was concerned with discriminatory practices of some unions under "closed shop" agreements. It thus enacted §§ 8(a)(3) and 8(b)(2) to proscribe the "closed shop" in interstate commerce and to limit the power of unions and employers to discipline employees under "union shop" provisions. See *Radio Officers Union* v. *NLRB*, 347 U.S. 17 (1954).

Section 14(b), added to the Act at the same time, authorizes the states to proscribe agreements "*requiring membership* in a labor organization as a condition of employment" (emphasis added). There is not a scintilla of evidence in the legislative history of § 14(b) to support the view that by "membership in a labor organization" Congress intended to authorize the states to proscribe anything other than "membership" in its common and universally understood sense. Senator Taft himself discussed the "agency shop" on the floor of the Senate, and both Congressional labor committees indicated their awareness of "agency shop" ar-

rangements,[10] recognizing that the "agency shop" is an arrangement which does not require "membership" in a labor union. Congress' awareness of the "agency shop" would have compelled it to deal with the "agency shop" in unambiguous terms, if it had intended to authorize the states to proscribe it under § 14(b).

Although the Taft-Hartley Act does not define the phrase "membership," Congress' most recent legislation on this subject contains a very explicit definition of the phrase "member." Section 3(o) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 402(o):

> " 'Member' or 'member in good standing', when used in reference to a labor organization, includes any person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and bylaws of such organization."

So defined, the difference between membership in a labor organization and the payment of a service fee to a labor organization is profound. It is the difference between citizenship in, as contrasted with the payment of taxes to, a state.

If Congress' intention in employing the phrase "membership in a labor organization" had been to

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[10] Senator Taft discussed the "agency shop" in the light of the famous arbitration award by Justice Rand of the Supreme Court of Canada in *Ford Motor Co.*, 1 Lab. Arb. Repts. 439 (1946). 2 Legis. Hist. of LMRA 1422. See also Hearings on Bills to Amend the NLRA, House Labor Committee, 80th Cong., 1st Sess., pp. 1158-1166; Hearings on S. 55, Senate Labor Committee, 80th Cong., 1st Sess., pp. 66-67, 806.

encompass the "agency shop," it would have used the phraseology of the "right-to-work" statutes in ten states which expressly prohibit the payment of any fees to a labor organization as a condition of employment.[11] The Mississippi statute, for example, expressly provides that (Miss. Code Ann. § 6984.5, Sec. 1(e), Supp. 1958):

> "No employer shall require any person, as a condition of employment or continuation of employment, to pay any dues, fees or other charges of any kind to any labor union or other labor organization."

These ten states have recognized that the term "membership" is not broad enough to encompass the contractual requirement of service fee payments to a labor union. They believed it necessary to say more in order to proscribe the "agency shop." Congress, not intending to authorize the prohibition of the "agency shop" under § 14(b), did not express its intention in this fashion.

By ruling that the phrase "membership" in § 14(b) means non-membership as well as "membership," the Florida Supreme Court has interpreted the federal Act contrary to this Court's precept that it was "the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation," requiring Congress' words to be interpreted in their common, ordinary meaning. *Local 1976, United Brotherhood of Carpenters* v. *NLRB*, 357 U.S. 93, 99-100 (1958). This precept is well-suited to the construction of § 14(b)

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[11] Alabama, Arkansas, Georgia, Iowa, Mississippi, North Carolina, South Carolina, Tennessee, Utah and Virginia. See footnote 4, *supra*.

which authorizes the states to create a narrow exception to the otherwise uniform federal law.

III. REGULATION OF THIS "AGENCY SHOP" CONTRACT BY THE FLORIDA COURTS IS FUNDAMENTALLY INCONSISTENT WITH THE DOCTRINE OF FEDERAL PREEMPTION, FOR THE ADMINISTRATION OF THIS CONTRACT IS EITHER A PROTECTED OR A PROHIBITED ACTIVITY AS A MATTER OF FEDERAL LAW

By regulating and prohibiting this voluntary agreement between petitioner and an interstate employer, the Florida Supreme Court has improperly entered a field of regulation entrusted exclusively to the National Labor Relations Board. Many decisions of this Court have made it ineluctably clear that such concurrent state regulation must fall.

Beginning with *Garner* v. *Teamsters*, 346 U.S. 485 (1953), a series of cases culminating most recently in *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236 (1959), and *Marine Engineers Beneficial Association* v. *Interlake Steamship Co.*, — U.S. —, 82 S. Ct. 1237, 8 L. Ed. 418 (1962) has expressed the doctrine of federal preemption of interstate labor relations: when an activity in commerce is "arguably" protected or prohibited by the federal Labor Act, "state court jurisdiction must yield," for "to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes." *Garmon, supra*, 359 U.S. at 244.

The "agency shop" arrangement is one which the National Labor Relations Board has for many years held to be lawful in interstate commerce. *Public Service Co. of Colorado*, 89 NLRB 418 (1950); *American Seating Co.*, 98 NLRB 800 (1952); *General Motors Corp.*, 130 NLRB No. 54 (1961), reconsidered and overruled in 133 NLRB No. 21 (1961), set aside and

enforcement denied *sub. nom General Motors Corp.* v. *NLRB,* F. 2d , 50 LRRM 2396 (6th Cir. 1962).

The *General Motors* case is discussed at pp. 18-19 *infra.* It is at least arguable that the execution of this contract in interstate commerce is a "protected" activity as a matter of federal law, *a fortiori* if § 14(b) does not authorize the states to prohibit such an agreement.

Even if this Court were to interpret § 14(b) as authorizing the states *to declare* unlawful "agency shop" agreements in commerce, the state courts have no jurisdiction *to regulate* such agreements. This is true because the execution of such a contract, *declared* unlawful by state law, arguably constitutes an unfair labor practice proscribed by federal law, subject to the exclusive regulation of the Labor Board: Section 14 (b) does not confer jurisdiction on the state courts to regulate and remedy contracts which are unlawful as a matter of state law; it merely authorizes the states to declare, as a matter of federal law, that agreements requiring "membership" are unlawful. *Bldg. Construction Trades Council* v. *American Builders,* 139 Colo. 236, 337 P. 2d 953 (1959). Cf. *United States* v. *Sharpnack,* 355 U.S. 286 (1958).

Section 8(a)(3) of the Labor Act, 29 U.S.C. § 158 (a)(3), however, makes it unlawful for an employer to enter into an agreement which violates employees' rights to refrain from union activities under § 7 of the Act, 29 U.S.C. § 157. When § 7 is read in conjunction with § 14(b) of the Act, it seems quite clear that Congress made it unlawful for an employer and a labor organization to require "membership" in a labor organization, if such requirement is declared unlawful by state law. Such an agreement arguably would be unlawful and subject to unfair labor sanctions under

§ 8(a)(3) of the Act. Therefore, even if an "agency shop" agreement may be prohibited by state law, it does not follow that the states have jurisdiction to regulate and remedy such an agreement in conflict with the jurisdiction of the Labor Board to regulate agreements which violate § 7 of the Act. The Supreme Court of Colorado has so reasoned. *Bldg. Construction Trades Council* v. *American Builders, supra.* The Colorado high court properly points out that "Section 14(b) only applies where such an agreement could not be executed or applied under any circumstances within the state," and "in the first instance, the Board would have jurisdiction to apply said section in a proper case, or cede to a state agency authority to try the matter." 337 P. 2d at 960.

That state court regulation of an "agency shop" agreement in commerce is inconsistent with the otherwise uniform federal law is illustrated by the divergent state remedies applied to violators of "right-to-work" laws. Executing an unlawful contract is remediable under § 10 of the federal Act by an NLRB cease and desist order following an administrative hearing. Execution of an "agency shop" agreement in South Carolina, on the other hand, subjects the negotiators to imprisonment for 30 days, a fine of $1,000, actual and punitive damages in a civil suit, and a civil injunction. (S.C. Code Ann. §§ 443.8 and 443.9 (Supp. 1960).) There could be no clearer conflict between state and federal remedies, demonstrating the necessity for the application of the doctrine of federal preemption to the instant case. Cf. *Garner* v. *Teamsters*, 346 U.S. 485 (1953).

Where states have heretofore sought to regulate protected or proscribed conduct under their "right-to-

work" laws, this Court has unhesitatingly reversed *per curiam*. *Teamsters Union* v. *Kerrigan Iron Works*, 353 U.S. 969 (1957); *Local 429, International Brotherhood of Electrical Workers* v. *Farnsworth & Chambers Co.*, 353 U.S. 969 (1957); *DeVries* v. *Baumgartner's Elec. Construction Co.*, 359 U.S. 498 (1959). Accord, *Douglas Aircraft Co.* v. *Local 379, International Brotherhood of Electrical Workers*, 101 S.E. 2d 800 (N.C. 1959).

This instant case, no less than the cases just cited, requires the application of the doctrine of federal preemption to preserve the exclusive jurisdiction of the Labor Board to administer federal law. And here, as in the cases just cited, state "right-to-work" statutes cannot justify the application of diverse principles and remedies to conduct in interstate commerce.

IV. A RECENT DECISION OF THE SIXTH CIRCUIT EMPHASIZES THE IMPORTANCE OF THE INSTANT CASE AND RAISES THE PROBLEM OF CONCURRENT STATE AND FEDERAL REGULATION OF "AGENCY SHOP" AGREEMENTS

The U. S. Court of Appeals for the Sixth Circuit has recently held that § 8(a)(3) of the Labor Act prohibits the execution of "agency shop" agreements in interstate commerce in all fifty states. *General Motors Corp.* v. *NLRB*, — F. 2d —, 50 LRRM 2396 (6th Cir. 1962) (not reported). In the opinion of the Sixth Circuit, § 8(a)(3) of the Labor Act authorizes employers and unions to enter into agreements requiring "membership" in a labor organization but does not authorize them to require "agency shop" service fee payments as a condition of employment which it sharply distinguishes from the requirements of "membership."

The National Labor Relations Board has announced that it intends to seek review of the *General Motors*

case in this Court. Address of NLRB Solicitor William Feldesman to Labor Law Section of American Bar Association, San Francisco, August 1962, 50 LRR 335 (August 13, 1962).

If the *General Motors* decision is a proper construction of § 8(a)(3), then the "agency shop" is unlawful as a matter of federal law in all fifty states, not just in the several "right-to-work" states. In such event it is clear *a fortiori* that the Florida courts have no jurisdiction to regulate such an agreement, for regulation by the Florida courts would inescapably conflict with the exclusive regulatory power of the Labor Board to prohibit the "agency shop" as an unfair labor practice.

If this Court grants review to the decision of the Sixth Circuit in the *General Motors* case, it is imperative that the Court simultaneously review the instant case. In the event that this Court should affirm the Sixth Circuit's decision, this Court should also determine whether the Florida courts may concurrently regulate the "agency shop" or whether the Florida courts must yield to the exclusive jurisdiction of the federal Labor Board. On the other hand, if this Court should reverse the decision of the Sixth Circuit, the important issues in this case remain to be resolved, *viz.*, whether the states have authority under § 14(b) to prohibit and to regulate the execution of an "agency shop" agreement in commerce.

While we believe that the Sixth Circuit in the *General Motors* case erred in its construction of § 8(a)(3), the Court is correct in distinguishing sharply between the "agency shop" and the "union shop" on grounds that the latter requires "membership" in a union and that the former does not.

V. A REAL ISSUE IN THIS CASE IS WHETHER THE ACT AUTHORIZES "RIGHT-TO-WORK" STATES TO EMASCULATE COLLECTIVE BARGAINING IN INTERSTATE COMMERCE BY REGULATING METHODS OF FINANCING COLLECTIVE BARGAINING

The ultimate question here is whether § 14(b) is a federal license to the individual states to emasculate collective bargaining in interstate commerce by criminally and civilly regulating the financing of collective bargaining functions. In labor relations, as in all other aspects of political life, the power of the purse strings is the power to control.

Did Congress intend by § 14(b) to authorize the states to exercise this kind of life-and-death control over labor relations in commerce? An examination of the scheme of the whole statute compels a negative answer, for Congres did not alter the bed-rock national labor policy to eliminate "obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining" when it enacted § 14 (b). Section 1, 29 U.S.C. § 151. The Court's language in striking down another Florida statute, which sought to license union representatives is equally applicable to Florida's regulation of the "agency shop": It "'stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress,'" which "cannot be created consistently with the Federal Act." *Hill* v. *Florida*, 325 U.S. 538, 542-543 (1945).

The Court may take judicial notice of the fact that the retail sales and service industries are peculiarly marked by very high employment turnover and by very low wages, one caused by the other. Without the agency shop to offset the unstable employment picture, the poverty stricken local unions will continue to face

enormous obstacles in achieving equality of bargaining power and effective collective bargaining. The Florida court's decision, and holdings of the same character in other states, stand as obstacles to the fulfillment of the national labor policy.

The "agency shop" contract in question requires employees who are not members of petitioner to pay a share of the costs of valuable collective bargaining. No issue of the reasonableness of the amount has been raised, nor have respondents ever challenged the value of the benefits they have received as a result of the union's efforts and services on their behalf. Petitioner has a legally enforceable duty under federal law to represent *all* bargaining unit employees fairly, including respondents, regardless of their union membership. *Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192 (1944); *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953); *Syres* v. *Oil Workers*, 350 U.S. 892 (1955). See generally Cox, The Duty of Fair Representation, 2 Vill. L. Rev. 151 (1957).

This Court has said that non-members are entitled even to express their views on the union's collective bargaining policies and to receive notices and opportunity for a hearing on the union's proposed actions. *Steele* v. *Louisville & Nashville R. Co., supra*, 323 U.S. at 204:

> "So long as a labor union assumes to act as the statutory representative of a craft it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft. While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, in collective bargaining and in

> making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith. Whenever necessary to that end, the union is required to consider requests of non-members of the craft and expressions of their views with respect to collective bargaining with the employer and to give them notice of and opportunity for hearing upon its proposed action."

Would Congress have imposed this duty of fair representation on a bargaining agent and at the same time authorized the states to regulate the agent's finances in such a manner as to make performance of that duty impossible or, at best, extremely difficult? Such an incongruous result would require a clear Congressional mandate which is lacking in § 14(b). Congress has long been aware that a union must have a regular and predictable source of funds to negotiate, administer and enforce contracts, adjust grievances, participate in arbitration, counsel employees, conduct strikes, and engage in the dozens of other vital functions of collective bargaining agent. This Court has recently said that a "union is a service agency . . . whenever it does its job." *Local 357, Teamsters* v. *NLRB,* 365 U.S. 667, 675-676 (1961). Without a regular and predictable source of finances how can a union engage in effective collective bargaining?

By prohibiting an historically established, internationally adopted method of financing collective bargaining functions, totally unrelated to union "membership" in its commonly used and understood sense, the Supreme Court of Florida has improperly entered an area exclusively regulated by federal law and has erroneously interpreted federal law to achieve a result contrary to the "fundamental purpose of the Act . . .

to protect interstate and foreign commerce from interruptions and obstructions caused by industrial strife." *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 237 (1938). The Florida court's decision is a crucial one requiring the ultimate reviewing power of this Court, for the decision below strikes hard at the national labor policy.

A further and imperative reason for this Court to review the instant case is that the Florida Supreme Court, like several other state courts, has asserted that this Court's decision in *Algoma Plywood & Veneer Co.* v. *Wisconsin Employment Relations Board*, 336 U.S. 301 (1949), is dispositive of the jurisdictional and substantive issues herein (R. 29). See also *Higgins* v. *Cardinal Mfg. Co.*, 188 Kan. 11, 360 P. 2d 456 (1961), *cert. denied sub nom. General Drivers* v. *Higgins*, 368 U.S. 829 (1961). The Supreme Court of Florida asserts (R. 29):

> "This question as to jurisdiction has been decided contrary to that contention in three recent cases of this kind in appellate courts in Arizona, Indiana and Kansas. We hold, as was held in those cases, that the Algoma case of 1949 which sanctioned state regulation of union security agreements impinging on state right to work laws has not been overruled in that respect by the subsequent decisions of the United States Supreme Court dealing with this question of pre-emption."

The *Algoma* case decided a different issue in an entirely different context, involving a state court decision which arose before the enactment of § 14(b), although decided subsequent to § 14 (b)'s enactment. This Court's holding in *Algoma* does not deal with the meaning of "membership in a labor organization" in

§ 14(b), yet it is regularly relied upon by the state courts as dispositive of the entire "agency shop" issue, an issue whose prominence is quite recent in labor relations. We believe it is imperative, therefore, that the Court should also decide whether the state courts' great reliance on *Algoma* is justified, particularly in view of this Court's subsequent decision in *Plankington Packing Co.* v. *Wisconsin Employment Relations Board*, 338 U.S. 953 (1950) (*per curiam*), and in many other, subsequent preemption cases.

CONCLUSION

For the foregoing reasons it is respectfully urged that this Court should issue its writ of certiorari to review the decision below.

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August 24, 1962.

APPENDIX

Not Final Until Time Expires to File Rehearing Petition and, If Filed, Determined

IN THE SUPREME COURT OF FLORIDA

January Term, A. D. 1962

Case No. 31,465

ALBERTA SCHERMERHORN, LOIS DEVITA, JOYCE E. THURO, and LARRY STARK, *Appellants*,

v.

LOCAL 1625 OF THE RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO; WILLIAM TRAVIS, President of local 1625 of the Retail Clerks International Association, AFL-CIO; and FOOD FAIR STORES, INC., SOUTHERN DIVISION, a Pennsylvania corporation, authorized to do business in Florida, *Appellees*.

Opinion filed April 25, 1962

An Appeal from the Circuit Court for Dade County, Pat Cannon, Judge Bernard B. Weksler, for Appellants.

Claude Pepper Law Offices, S. G. Lippman (Washington, D. C.), Tim L. Bornstein (Washington, D. C.), and Kaplan, Ser & Abrams, for Local 1625 of the Retail Clerks International Association, AFL-CIO, et al. and Aronovitz, Aronovitz & Haverfield and Robert M. Haverfield for Food Fair Stores, Inc., Southern Division, Appellees.

Bolles & Prunty for John Hancock Mutual Life Insurance Company; Allen Clements, J. Albert Woll (Washington, D. C.) and Theodore J. St. Antoine (Washington, D. C.) for American Federation of Labor and Congress of Industrial Organizations and Florida State Federated Labor Council; John L. Kilcullen (Washington, D. C.) and T.

David Burns, for Florida Right to Work Committee, Amicus Curiae.

HOBSON, J.

The appellants, plaintiffs in the action below, sought by an action in equity to enjoin the appellee labor union and Food Fair Stores from enforcing the provisions of an "Agency Shop" clause contained in a collective bargaining contract between the union and Food Fair. The contract provision under attack provides that employees who are not union members "shall be required to pay as a condition of employment, an initiation service fee and monthly service fees to the union," such amounts being equal to the initiation fees and monthly dues for union members. The appellants are non-union employees of Food Fair. It is their contention that the agency shop provision of the contract violates the "right to work" provision of the Declaration of Rights of the Florida Constitution, Section 12.

A motion to dismiss the complaint was filed on the grounds, first, that the matter was one within the exclusive jurisdiction of the National Labor Relations Board by virtue of the provisions of 29 U.S.C.A. §§ 141-188, and also that the contract provision does not violate Section 12 of the Declaration of Rights.

The trial court granted the motion to dismiss and entered a final order wherein it was stated in part:

> ". . . the Complaint . . . is hereby dismissed for the reason that the court finds that the agency shop clause, Section 2, Article 19 of the contract between the defendant Union and defendant Food Fair is not violative of the Florida 'right to work law' as contained in Section 12 of the Declaration of Rights of the Constitution of Florida . . ."

The cause was appealed to the District Court of Appeal, Third District. The District Court heard arguments and

filed an opinion in which the decree of the chancellor was reversed and the cause remanded. Before that decision became final the appellees filed a motion to the court to withdraw its opinion and transfer the appeal to this court, asserting that the appeal should have been made directly to this court because the decision was one "construing a controlling provision of the Florida Constitution." Article V, Section 4, Florida Constitution. The District Court granted the motion and transferred the cause to this court, and entered an order withdrawing its opinion, conditioned upon this court's accepting jurisdiction. The initial question with which we are faced is whether we have jurisdiction to determine this cause on a direct appeal.

In our judgment, the chancellor's order quoted above clearly and unquestionably construes Section 12, Declaration of Rights. Unlike in Milligan v. Wilson, Fla., 104 So. 2d 35, and Carmazi v. Board of County Commissioners, Fla., 104 So. 2d 727, the issues in the instant case required the trial court to rule directly on a constitutional provision. Moreover, the fact that there was such a direct ruling appears from the face of the lower court's order. The question is whether the ruling amounts to a construction of Section 12, Declaration of Rights. As stated in Armstrong v. City of Tampa, Fla., 106 So. 2d 407, and in Cohen v. State, Fla., 121 So. 2d 155, the trial court will be held to have construed a controlling provision of the constitution if the court undertakes to "eliminate existing doubts arising from the terms of the constitutional provision." In the instant case, there were "existing doubts," inasmuch as it has never before been determined by an appellate court in this State whether an agency shop clause contravenes the "right to work" amendment of our Constitution. The trial court undertook to eliminate these doubts by squarely holding that the contract clause was valid.

The Chancellor did not merely apply the facts "to a recognized clear-cut provision of the Constitution," as in

Page v. State, Fla., 113 So. 2d 557, because the right to work clause is not "clear-cut" when considered in connection with the facts presented in the instant case. On the contrary, the trial court was confronted with, and decided, a legitimate constitutional question of first impression.

In Boyd v. Dade County, Fla., 123 So. 2d 323, we recognized that it was the plain constitutional plan of Article V, Section 4, "that judgments construing controlling provisions of the Florida Constitution, being of such great importance to all the people, should be decided by direct appeals to the one court beyond which there can be no further appeal." (Emphasis supplied.) Certainly, the constitutional question decided in the instant case is of no less importance to the general public merely because the chancellor did not see fit to launch into an extended dissertation giving his reasons for construing the constitutional provision as he did. Moreover, since the order on its face shows that the constitution was construed, this is not a case where it is necessary that we return the cause to the chancellor for a determination as to the basis of his ruling.

In the case of Boyd v. County of Dade, Fla., 123 So. 2d 323, we held that we had jurisdiction on direct appeal because the trial court had construed a controlling provision of the Florida Constitution in its order denying a motion for a jury trial in the Metropolitan Court of Dade County. The pertinent portion of the trial court's order was as follows:

> "'* * * after hearing argument of counsel and carefully considering each of the constitutional rights raised by the defendant for trial by jury and being otherwise fully advised in the premises, finds that the grounds given by the defendant in his request for a jury trial are not applicable to this Court. * * *.'"

Since, by virtue of the above quoted order, it was held that this court had jurisdiction on direct appeal, it is equally clear in the instant case that the trial court construed a controlling provision of the Florida Constitution within the meaning of Article V, Section 4, and that we therefore possess jurisdiction to determine this cause on direct appeal.

Upon full consideration of the arguments and briefs of the parties, as well as the briefs of the various amici curiae, we are of the opinion that the judgment of the trial court must be reversed for the reasons set forth herein and in the excellent and learned opinion prepared for the District Court of Appeal, Third District, by Judge CARROLL, which is hereinafter set out in haec verba.

The portion of Section 12 of the Declaration of Rights which is in issue, reads as follows:

> "The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer."

This section clearly bestows on the workingman a right to join or not to join a labor union, as he sees fit, without jeopardizing his job. Inasmuch as the Constitution has granted this right, the agency shop clause is repugnant to the Constitution in that it requires the non-union employee to purchase from the labor union a right which the Constitution has given him. The Constitution grants a free choice in the matter of belonging to a labor union. The agency shop clause contained in the contract under consideration purports to acknowledge that right, but in fact, abrogates it by requiring the non-union worker to pay the union for the exercise of that right or, in the alternative, to be discharged from his employment. Such an arrangement

is palpably and totally inconsistent with the freedom of choice contemplated by our Declaration of Rights, Section 12.

The appellees contend that, except for the "agency-shop" provision, the non-union employees of the appellant Food Fair would be "free riders," that is, they would reap the benefits of union representation without having to bear any of the cost thereof. This argument is grounded on the fact that the union is, by law, the bargaining agent for all employees—those who do not belong to the union as well as those who do. 29 U.S.C.A. §159. This argument may be answered by reference to the section of the Constitution under consideration. Clearly, it is the intent of this section to leave as a matter for *individual determination and preference* the question of whether the worker will derive any benefit from association with a labor union. The choice is his to make. Presumably, the appellants in the instant case have decided that union membership is not an overall benefit to them personally, else they would have joined.

The appellees further assert that our state courts are without jurisdiction to determine this matter, because of the pre-emption by the federal government of the field of labor relations, by virtue of the Labor Management Relations Act, 29 U.S.C.A. §§ 141-188. We hold, as did the Supreme Court of Kansas in the case of Higgins v. Cardinal Manufacturing Company, 188 Kan. 11, 360 P. 2d 456, that Section 14(b) of the Taft-Hartley Act [29 USCA § 164(b)] preserves the jurisdiction of the states in matters involving state "right-to-work" provisions. It is true that Section 14 (b) specifically deals only with "agreements requiring *membership* in a labor organization as a consideration of employment . . ." However, it is not to be presumed that Congress would preserve to the states the field of right-to-work legislation, while, at the same time, intending that unions and management could, by the use of subterfuge of an agency shop clause, circumvent and, in effect, nullify a

paramount provision of the organic law of any of the several states.

A recent decision of the Federal District Court of Nevada, as yet unreported, squarely supports our holding herein regarding the power of the states under Section 14(b) to prohibit the enforcement of agency shop agreements. In that case, the court held that although the literal language of Section 14(b) only reserves to the states the right to prohibit agreements making union *membership* compulsory, it would frustrate the congressional intent to construe that section so as to prevent the states from also prohibiting agency shop agreements. In its opinion, the District Court stated:

> "Section 14(b) be bereft of meaning if we were to construe it in a fashion which would render the states powerless to make illegal that type of union security agreement which imposes liabilities on the working man which, realistically, are the same liabilities, which under the section, the states may remove." Amalgamated Association of Street, Electric Railway and Motor Coach Employees, Division 1225 v. Las Vegas-Tonopah-Reno Stage Line, Inc., U.S.D.C. Nev., January 12, 1962; 30 U.S. L. Week 2392.

Having thus expressed the opinion of this court on the question of its jurisdiction as well as the chief issues involved in this case, we hereby approve and adopt as our own the following unpublished opinion by the District Court of Appeal, Third District, prepared by CARROLL, J.:

"The appellants, who were plaintiffs below, filed suit in equity for themselves and for all others similarly situated, against Food Fair Stores, Inc., Southern Division, a Pennsylvania corporation doing business in Florida, and the appellee labor union and its president, to enjoin the application to plaintiffs and other non-union employees of any

'agency shop contract' between the employer and the union.[1] The contract provided that employees who were not members of the union 'shall be required to pay as a condition of employment, an initiation service fee and monthly service fees to the union,' being the amounts union members pay for initiation and for monthly dues.

"The complaint charged the contract violated the right to work provisions of the Florida Constitution[2] and statutes.[3] The trial court rejected that contention and rendered judgment for defendants, holding that the agency shop contract was not in violation of the Florida right to work law, and the plaintiffs appealed.

"In a motion to dismiss in the trial court and again here the defendants-appellees contended that the controversy is one within the jurisdiction of the National Labor Relations Board,[4] under § 8 of the Act (29 U.S.C.A. § 158),

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"[1] Through representing the majority, the union had gained the right under the law to act as bargaining agent for all of the employees. § 8 (a)(5), National Labor Relations Act, 29 U.S.C.A. § 158 (a) (5); § 9(a), 29 U.S.C.A. 159 (a).

"[2] '* * * The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer. * * *' Fla. Const., Declaration of Rights, § 12, 25 F.S.A.

"[3] §§ 447.01 and 447.09, Fla. Stat., F.S.A.

"[4] Essential to that contention was that the business involved be one engaged in interstate commerce. The record shows no allegation or reference to the subject matter being within the flow of interstate commerce. But we proceed on the assumption that it is, since the parties so treated it in argument. See Wood, Wire & Metal Lathers International Union v. Babcock Co., decided July 31, 1961, ... So. 2d ....,

and that as a consequence we are required to yield jurisdiction to the Board.[5]

This question as to jurisdiction has been decided contrary to that contention in three recent cases of this kind in appellate courts in Arizona, Indiana and Kansas.[6] We hold, as was held in those cases, that the Algoma case[7] of 1949 which sanctioned state regulation of union security agreements impinging on state right to work laws has not been overruled in that respect by the subsequent decisions of the United States Supreme Court dealing with this question of pre-emption. Not only has Algoma not been expressly overruled, but it has repeatedly been recognized and cited with apparent approval in the later United States Supreme Court cases. See Colgate-Palmolive-Peet Co. v. N.L.R.B., 338 U.S. 355, 70 S. Ct. 166, 94 L. Ed. 161, 168; Garner v. Teamsters C. & H. Union, 346 U.S. 485, 74 S. Ct. 161, 98 L. Ed. 228, 238; Weber v. Anheuser-Busch, 348 U.S. 468, 75 S. Ct. 480, 99 L. Ed. 546, 556; Guss v. Utah L.R.B., 353 U.S. 1, 77 S. Ct. 598, 1 L. Ed. 2d 601, 607; Local 24

"[5] This court has repeatedly recognized the doctrine of federal pre-emption and ceded jurisdiction to the Board in cases where it was shown to be required. See Amalgamated Clothing Workers, etc. v. Donald S. La Vigne, Inc., Fla. App. 1958, 111 So. 2d 462; International Ladies Garment W.U. v. Sherry Mfg. Co., Fla. App. 1959, 115 So. 2d 27; 'International Hod Carriers', etc. v. Heftler Const. Co., Fla. App. 1959, 116 So. 2d 30; North Dade Plumbing, Inc. v. Bowen, Fla. App. 1960, 116 So. 2d 790; I.B. of E. W. Local 349 v. Shires, Fla. App. 1960, 123 So. 2d 259; Casteel v. United Brotherhood of Carpenters & Join., Fla. App. 1960, 125 So. 2d 123; Wood, Wire & Metal Lathers International Union v. Babcock Co., supra.

"[6] Sheet Metal Workers International Ass'n. v. Nichols, (1961), 89 Ariz. 187, 316 P. 2d 204; Meade Electric Company v. Hagberg, (1959), 129 Ind. App. 631, 159 N.E. 2d 408; Higgins v. Cardinal Manufacturing Company, (1961), 188 Kan. 11, 360 P. 2d 456.

"[7] Algoma P. & V. Co. v. Wisconsin Emp. Rel. Bd., 336 U.S. 301, 69 S. Ct. 584, 93 L. Ed. 691.

of I.B. of T.C.W. v. Oliver, 358 U.S. 283, 79 S. Ct. 297, 3 L. Ed. 2d 312, 321; San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 785, 788 (concurring opinion). As late as 1959, in the Oliver case, in footnote 10, it was said (358 U.S. at 296):

> 'In Algoma, state law was allowed to operate to restrict a provision of a collective bargaining contract only after it was found after an exhaustive examination of the legislative history of the Wagner Act that Congress intended to leave the special subject of the legality of maintenance of membership clauses up to the States through § 8(3) of that Act, 49 Stat. 452. Questions of the nature that we consider today were expressly left open. 336 US at 312.' This exception from the federal pre-emption doctrine seems an obvious one brought about by § 14(b) of the Federal Act,[8] which specifically authorizes and recognizes the validity of right to work laws of the several states. We agree with the statement of the Kansas Supreme Court on this point, where it was said: 'There would be little point in permitting the states to enact such [right to work] laws if they could not be enforced by the states.'[9]

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[8] 'Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.' 29 U.S.C.A. § 164(b).

[9] In support of the argument for pre-emption appellees referred to a recent instance in which the National Labor Relations Board took jurisdiction of a matter which was claimed to have dealt with the question of an agency shop contract vis-a-vis a state right to work law. The ruling involved (130 N.L.R.B. No. 54), which concerned General Motors Corporation, was made in February of 1961, and is found in 4 C.C.H. Law Rep., N.L.R.B. decision § 9663, p. 14,978. Examination of that ruling shows the question before the Board was not whether the *making and application* of an agency shop contract was violative of a state right to work law

"The chancellor was eminently correct in assuming jurisdiction and in not ceding it to the Board in this instance. But we hold that the chancellor was in error in ruling that this agency shop contract does not violate the Florida right to work law.

"Appellants contend the agency shop contract denies or abridges their right to work in violation of the Florida right to work law, by exacting tribute from them because of their non-membership in the union as a condition of their employment or continued employment.

"Appellees argue that because the union has gained the right to act as bargaining agent for all of the employees it is only fair that the non-member sector of the employees should have to pay money to the union as a condition of their right to work, to help the union defray the cost of such bargaining.

"Regarding the intent and policy of this state's right to work law, the Supreme Court of Florida in Local Union No. 519 v. Robertson, Fla. 1952, 44 So. 2d 899, 902, said:

> 'By these provisions of the Constitution and the statutes the public policy of the State of Florida with respect to labor activities and labor opportunities has been set forth and defined. Under these provisions it is the declared public policy of the State that all work-

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(which question, as recognized in the Algoma case is reserved to the state for determination), but the question before the Board was whether, in a state having a right to work law, refusal of an employer to bargain with a union with respect to inclusion of an agency shop clause in a bargaining contract was an unfair labor practice. Interestingly, the Board upheld the employer's refusal to bargain under those circumstances. Appellees strongly urged that such ruling of the Board constituted evidence and precedent for pre-empting jurisdiction of the matter involved here, but from the nature of the question which was before the Board, as we have pointed out, the action of the Board in that instance could not be given the effect which the appellee assigned to it.

ing men, whether union or non-union, shall be considered on an equal footing with respect to labor opportunities. They are guaranteed complete freedom of decision in whether to join or refrain from joining any labor organization. *No person or organization may deny them the right of obtaining or retaining employment, nor may the right be abridged, by reason of membership or nonmembership in any labor organization.* They are not to be coerced or intimidated in the enjoyment of their legal rights, including the right of free decision as to whether or not they will join a union, and any person or labor organization who so coerces or intimidates them is to be deemed guilty of a crime punishable by fine or imprisonment, or both.' [Italics supplied.]

"Under § 12 of the Declaration of Rights of Florida what is prohibited is the denial or *abridgement* of one's right to work 'on account of membership or non-membership in any labor union, or labor organization.' When, because of his non-membership, an employee is required to pay labor union dues, or sums equal to the dues, as a condition of employment or continued employment, his right to work is 'abridged.'

"Anything which imposes a charge or expense upon the free exercise of a right, abridges it in the sense of curtailing or lessening the use of enjoyment of that right. As defined in Webster's New International Dictionary, to abridge is 'to deprive; to cut off; to diminish, curtail.' And 'abridge' is defined in The Oxford English Dictionary as being 'to curtail, to lessen, to diminish (rights, privileges, advantages, or authority.)' The Louisiana Supreme Court adopted this meaning and definition of *abridged* as contained in the right to work law of that state,[10] saying:

"[10] Piegts v. Amalgamated Meat Cutters, etc., 228 La. 131, 81 So. 2d 835, 838.

'The public policy of Louisiana is expressed in the Right to Work Act, Section 1, supra. In analyzing "the right of a person or persons to work shall not be denied or *abridged* on account of membership or nonmembership in any labor union or labor organization", we must look to the meaning of the word "abridged". A study of various law dictionaries and Webster's Dictionary will show that the Legislature intended the word "abridged", as used in the Act, to mean "diminished, reduced, curtailed, or shortened".'

"The natural and reasonable interpretation of the Florida constitutional amendment, which prohibits compulsory membership in a labor organization as a condition of employment or of continued employment, is that it necessarily forbids forcing a non-member employee to pay union initiation fees, dues and assessments or equivalent amounts as a condition of employment or of continued employment. A contrary construction of the right to work law would leave it little or no useful purpose to serve.[11]

"For the reasons stated, we are impelled to hold that the 'agency shop' provision in the contract here under attack violates § 12 of the Declaration of Rights of Florida, which declares the right to work policy of this state. Accordingly, the decree is reversed and the cause remanded for further proceeding not inconsistent herewith.

"Reversed and remanded."

Regarding Footnote [9] of the foregoing opinion, it should be pointed out that the NLRB has since receded from its opinion in the General Motors Corporation case, 130 N.L.R.B. No. 54. See 133 N.L.R.B. No. 21. Likewise,

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"[11] *Accord*, Sheet Metal Workers International Ass'n. v. Nichols, supra, 89 Ariz. 187, 316 P. 2d 204; Higgins v. Cardinal Manufacturing Company, supra, 188 Kan. 11, 360 P. 2d 456. *Contra*, Meade Electric Company v. Hagberg, supra, 129 Ind. App. 631, 159 N.E. 2d 408.

it should be noted that on December 15, 1961, the Supreme Court of the United States denied a petition for certiorari in the case of Higgins v. Cardinal Manufacturing Company, supra, Footnote [6].

For the reasons stated in our own opinion, and in the opinion adopted by us, the decree is reversed and the cause remanded for further proceedings not inconsistent herewith.

It is so ordered.

ROBERTS, C.J., DREW and THORNAL, J.J., and PARKS, Circuit Judge concur

THOMAS, J., dissents because of lack of jurisdiction

O'CONNELL, J., dissents as to jurisdiction, concurs as to merits

O'CONNELL, J., Dissenting.

I must dissent because I am of the opinion that this court does not have jurisdiction to decide this caise. However, I fully agree with the opinion on the merits of this cause.

Mandate from Supreme Court of Florida

To the Honorable, the Judges of the Circuit Court for the Eleventh Judicial Circuit of Florida. Greeting:

WHEREAS, Lately in the Circuit Court of the Eleventh Judicial Circuit, in and for the County of Dade in a cause wherein

(Circuit Court No. 60C 11562—IN CHANCERY)

ALBERTA SCHERMERHORN, LOIS DEVITA, JOYCE E. THURO, and LARRY STARK, individually, as well as in a representative capacity on behalf of each and all other persons of a multitudinous class to which they belong and which is similarly situated, were *plaintiffs*

and

LOCAL 1625 OF THE RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO; WILLIAM TRAVIS, President of Local 1625 of the Retail Clerks International Association, AFL-CIO; and FOOD FAIR STORES, INC., SOUTHERN DIVISION, a Pennsylvania corporation, registered to do business in the State of Florida, were *defendants*

the Decree of said Circuit Court was rendered Dec. 23, 1960 as by the inspection of the transcript of the record of the said Circuit Court which was brought into the Supreme Court of the State of Florida, by virtue of an appeal agreeably to the laws of said State in such case made and provided, fully and at large appears:

AND WHEREAS, at the January Term of said Supreme Court holden at Tallahassee, A. D. 1962, the said cause came on to be heard before the said Supreme Court on the said transcript of the record and was argued by counsel; in consideration whereof, on the 25th day April A. D. 1962 the said Supreme Court rendered its opinion and judgment in said cause as per copy thereof hereto attached and made a part hereof.

In Consideration Whereof, It Is Ordered by the Court that the Appellant do have and recover of and from the appellees costs in this behalf expended herein taxed at Twenty-Five Dollars, and that all other costs shall be taxed in the court in which the appeal was entered, therefore,

YOU ARE HEREBY COMMANDED, That such further proceedings be had in said cause as according to right, justice, the judgment of said Supreme Court, and the laws of the State of Florida, ought to be had, the said Decree of the Circuit Court notwithstanding.

WITNESS, The Honorable B. K. ROBERTS
Chief Justice of said Supreme Court, and the seal of said Court at Tallahassee, this 14th day of May 1962

(SEAL) /s/ GUYTE P. MCCORD
Clerk Supreme Court of Florida.

IN THE SUPREME COURT OF FLORIDA
July Term, A. D. 1962
Wednesday, July 18, 1962

ALBERTA SCHERMERHORN, LOIS DEVITA, JOYCE E. THURO, and LARRY STARK, *Appellants*,

v.

LOCAL 1625 OF THE RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO; WILLIAM TRAVIS, President of Local 1625 of the Retail Clerks International Association, AFL-CIO; and FOOD FAIR STORES, INC., SOUTHERN DIVISION, a Pennsylvania corporation, authorized to do business in Florida, *Appellees*.

Upon consideration of the application for additional stay of Local 1625 of the Retail Clerks International Association, AFL-CIO, and William Travis, President thereof, appellees in the above cause, it is ordered that the execution and enforcement of the judgment of this Court entered in said cause April 25, 1962, be and is hereby stayed until August 23, 1962, to enable said applicants to have a reasonable time in which to apply for and to obtain, if they can, a review of said cause by the Supreme Court of the United States, and if such proceeding is perfected and filed in the Supreme Court of the United States on August 23, 1962, that said judgment be further stayed until said proceeding is disposed of by the Supreme Court of the United States or until the further order of this Court. This order is subject to cancellation at any time if petitioner fails to prosecute such review with reasonable dispatch.

It is further ordered that the Circuit Court in and for Dade County (the trial court in this cause) hold the mandate in this cause heretofore transmitted to said Clerk by the

Supreme Court of Florida without further action thereon during said stay period.

A True Copy
TEST:
GUYTE P. McCORD
Clerk Supreme Court.
By: ELLA O'NEILL WILKINS
Deputy Clerk.

IN THE SUPREME COURT OF FLORIDA
July Term, A. D. 1962
Wednesday, May 23, 1962

ALBERTA SCHERMERHORN, LOIS DEVITA, JOYCE E. THURO, and LARRY STARK, *Appellants*,

v.

LOCAL 1625 OF THE RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO; WILLIAM TRAVIS, President of Local 1625 of the Retail Clerks International Association, AFL-CIO; and FOOD FAIR STORES, INC., SOUTHERN DIVISION, a Pennsylvania corporation, authorized to do business in Florida, *Appellees*.

Upon consideration of the application of Local 1625 of the Retail Clerks International Association, AFL-CIO, and William Travis, President thereof, appellees in the above cause, it is ordered that the execution and enforcement of the judgment of this Court entered in said cause April 25, 1962, be and is hereby stayed for ninety (90) days from April 25, 1962, to enable said applicants to have a reasonable time in which to apply for and to obtain, if they can, a review of said cause by the Supreme Court of the United States, and if such proceeding is perfected and filed in the Supreme Court of the United States within said ninety (90) day period, that said judgment be further stayed until

said proceeding is disposed of by the Supreme Court of the United States or until the further order of this Court. This order is subject to cancellation at any time if petitioner fails to prosecute such review with reasonable dispatch.

It is further ordered that the Circuit Court in and for Dade County (the trial court in this cause) hold the mandate in this cause heretofore transmitted to said Clerk by the Supreme Court of Florida without further action thereon during said stay period.

A True Copy
TEST:

GUYTE P. MCCORD
Clerk Supreme Court.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
July Term, A.D. 1961
Thursday, September 14, 1961
Case No. 61-7

ALBERTA SCHERMERHORN, LOIS DEVITA, JOYCE E. THURO, and LARRY STARK, *Appellants,*

v.

LOCAL 1625 OF THE RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO; WILLIAM TRAVIS, President of Local 1625 of the Retail Clerks International Association, AFL-CIO; and FOOD FAIR STORES, INC., SOUTHERN DIVISION, a Pennsylvania corporation, authorized to do business in Florida, *Appellees.*

Following the filing on August 31, 1961, of our opinion and judgment but before issuance of our mandate, appellees moved this court to withdraw its opinion and transfer the

cause to the Supreme Court, asserting the appeal should have been made to the latter court because, they contend, the decision of the trial court was one "construing a controlling provision of the Florida constitution" (Art. V, Section 4(2), Fla. Const., 26 F.S.A.) and therefore excluded from our jurisdiction as prescribed in Art. V, Section 5(3), ibid.

On consideration of said motion and on authority of the recent Supreme Court decision in Robinson v. State, filed July 14, 1961, ... So. 2d ...., and in order that the question as to jurisdiction over this appeal may be determined by the court of paramount jurisdiction, we make this transfer of the cause to the Supreme Court under rule 2.1(5)(d), F.A.R.; and to effectuate this order our mandate is stayed, and if the Supreme Court takes jurisdiction of the appeal our opinion and judgment filed herein on August 31, 1961, shall stand vacated without further order; but if the Supreme Court concludes it does not have jurisdiction of the appeal then our said opinion and judgment will remain in force and our mandate will be directed to issue thereon.

Accordingly, and on the basis outlined hereinabove, it is ordered that the notice of appeal together with all papers filed prior to September 21, 1961, shall on that date be transferred to the Supreme Court of Florida as the proper court having jurisdiction in this case.

A True Copy
ATTEST:

/S/
Clerk District Court of
Appeal Third Circuit

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA IN CHANCERY

No. 60C 11562

ALBERTA SCHERMERHORN, LOIS DEVITA, JOYCE E. THURO, and LARRY STARK, individually, as well as in a representative capacity on behalf of each and all other persons of a multitudinous class to which they belong and which is similarly situated, *Plaintiffs*,

v.

LOCAL 1625 OF THE RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO; WILLIAM TRAVIS, President of Local 1625 of the Retail Clerks International Association, AFL-CIO; and FOOD FAIR STORES, INC., SOUTHERN DIVISION, a Pennsylvania corporation, registered to do business in the State of Florida, *Defendants*.

Judgment for Defendants

This cause came on to be heard after due notice to the parties upon the plaintiffs' prayer for temporary injunction contained in the Complaint herein and upon Response to Application for Temporary Injunction, Motion to Dismiss and verified Answer of the defendants Local 1625 of the Retail Clerks International Association, AFL-CIO and William Travis, president thereof, at which hearing were present the plaintiffs, their counsel, the defendant Travis, representatives of the other defendants and their counsel, and witnesses for the parties, at which time the Court heard preliminary statements from counsel for the various parties as to the contentions and positions of the parties, at which time counsel for defendant Food Fair moved ore tenus to adopt the defensive motions filed by the other defendants, which motion was granted by the Court, and, after reserving ruling on the defensive motions, heard testimony of the plaintiffs and their witnesses and received documentary

evidence on behalf of the plaintiffs and defendants and the depositions of the individual plaintiffs taken on behalf of the defendants, and heard argument of counsel, and the Court being otherwise fully advised in the premises, upon consideration thereof;

It is ORDERED, ADJUDGED and DECREED as follows:

1. That the prayer for temporary injunction contained in the Complaint be and is hereby denied.

2. That the Motions to Dismiss of the defendants be and are hereby granted and the Complaint in this cause be and is hereby dismissed for the reason that the Court finds that the agency shop clause, Section 2, Article 19 of the contract between the defendant Union and defendant Food Fair is not violative of the Florida "right to work law" as contained in Section 12 of the Declaration of Rights of the Constitution of Florida and Chapter 447, Florida Statutes.

3. That judgment in favor of the defendants herein be and is hereby granted and the plaintiffs shall go hence without day.

DONE and ORDERED in Chambers, at Miami, Dade County, Florida, this 23 day of December, 1960.

/s/ PAT CANNON
Circuit Judge